

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CGLM, INC.

and

Case 15–CA–17889

ALAN KANSAS, an Individual

Charles R. Rogers, Esq., for the General Counsel.

Donald C. Douglas, Jr., Esq., for the Respondent.

Alan Kansas, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in New Orleans, Louisiana, on June 26 and 27, 2006, pursuant to a complaint that issued on February 23, 2006.¹ The complaint alleges the discharge of five employees for engaging in protected concerted activity in violation of Section 8(a)(1) of the National Labor Relations Act. The Respondent's answer denies any violation of the Act and pleads that one of the discharged employees, Bobbie Marshall, Jr., was a supervisor as defined in the Act. I find that Bobbie Marshall, Jr., was not a supervisor and that the five employees were discharged for engaging in protected concerted activity as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, CGLM, Inc., the Company, is a Louisiana corporation with offices in Jefferson, Louisiana, where it is engaged in the sale and delivery of furniture. The Company, in conducting its business, annually purchases and receives at its facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Louisiana. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Company sells La-Z-Boy furniture. It has three showrooms in the New Orleans,

¹ All dates are in 2005 unless otherwise indicated. The charge was filed on December 5.

Louisiana, area, and a warehouse and office in Jefferson, Louisiana. President and part owner Larry Marquez began selling La-Z-Boy furniture in 1989 at one showroom. Two of his first employees were Bobbie Marshall, Jr., and Freddie Hughes. I shall, henceforth, refer to Bobbie Marshall, Jr., as Marshall. The business expanded and, in 2005, consisted of the three
 5 showrooms and the warehouse at which shipments of furniture are received and from which deliveries are made to the showrooms and to customers. Marshall, whose title was Warehouse Manager, oversaw operations in the warehouse. Hughes, designated as the service technician, repaired furniture and went to customers' homes to correct any problems that customers experienced with the furniture. Five other employees worked from the warehouse including
 10 William (Will) Norton, Lionel Robinson, and alleged discriminatees Derrick Thornton, Reginald (Reggie) Austin, and Bobbie Marshall, III, who is the son of Warehouse Manager Marshall. All of the warehouse employees, except for Norton, are African-American.

Derrick Thornton recalled that Crystal Cloutre was hired as Service Manager in 2004.
 15 She worked in an office adjacent to the warehouse floor. Marquez worked out of a private office upstairs. Cloutre received calls from customers and the three showrooms regarding their needs. She prepared and presented delivery tickets to Marshall who passed them on to the drivers who had preassigned routes to fill the requests. Cloutre was assisted by employee Tiffany Meliet. The complaint alleges, the Respondent's answer admits, and documentary
 20 evidence establishes that Cloutre is a supervisor. Marquez, Cloutre, and Meliet are white.

The Company has three delivery trucks, but in the summer of 2005 only two were being operated. The drivers were Derrick Thornton, assisted by helper Bobbie Marshall, III, and, Lionel Richardson, assisted by Will Norton. Reggie Austin, who has a vision problem, worked in
 25 the warehouse throughout the day. If necessary, Warehouse Manager Marshall would drive.

The year 2004 was not profitable for the Company. Marquez typically informed employees in May of any increase in pay that they were to receive. In May 2005, he individually told each warehouse employee that there would be no pay increase. Employees Austin and
 30 Marshall, III, were upset by the absence of a pay increase because both of them understood that a white warehouse employee identified as "Scott," who had begun working after them but was no longer employed, had been hired at \$8 an hour. Austin had been hired at \$6.50 an hour and Marshall, III, had been hired at \$6 an hour. Neither was being paid \$8 an hour.

Austin was also upset with what he considered to be favoritism towards Norton who, he testified, would sit in the office talking to Cloutre while the African-American employees were working. On one occasion when he and Norton were sitting down, Cloutre came out with a service order, said nothing to Norton, and asked Austin why he was sitting down. Austin replied that he was taking a break and that Norton had just got to work. He asked Cloutre, "Why didn't
 40 you question him?" He reported the foregoing incident to Marquez who said, "Reg, are you sure you weren't seeing things?" Austin answered, "[I]t wasn't what I saw, [i]t was what I heard."

In the spring of 2005, Marquez informed service technician Hughes that, henceforth, Service Manager Cloutre would order the parts that he used to repair the furniture. Hughes did
 45 not protest, testifying that "he's the boss," but pointed out the difficulty caused by the change because Cloutre "didn't know ... the parts."

Thornton was upset with the fact that, before first speaking with the driver regarding customer complaints, Cloutre "would go straight to Larry [Marquez] and that when Marquez "thought the warehouse employees were doing something wrong he was ready to punish us ..., [but] [a]s soon as he found out it was Crystal [Cloutre], everything was fine and dandy."

On July 26, Clouatre directed Marshall to throw out a chair that had been repaired but for which the customer had not called. Marshall initially objected, but thereafter complied. Shortly thereafter, Marquez came looking for the chair because the customer had called for it. Marshall explained that Clouatre had directed that it be thrown out. Marquez said that he did not believe that, and, as he was leaving, stated that if he found out that “any one of you guys threw that chair away, you all are going to pay for it.” Only Marshall and Austin were present. Later that day, Marquez told Marshall that Clouatre admitted that she told him to throw out the chair.

Marshall’s description of the foregoing encounter avoided any racial implications. Employee Reggie Austin, who witnessed the foregoing conversations, testified that he was concerned that when Marquez thought that an African-American employee was responsible for the throwing out of the chair, Marquez intended to hold him financially responsible but after Service Manager Clouatre admitted her responsibility, Marquez said nothing about anyone having to pay.

The next day, July 27, Tiffany Meliet called Marshall regarding a “pouch” that contained orders from one of the showrooms. Marshall testified that he checked the trucks but did not find the pouch, and reported his effort to Meliet and Clouatre. Austin recalled that he and Marshall were putting up furniture and that Marshall told Clouatre that he could not help look for the pouch, that it was her responsibility. Regardless of whether Marshall did or did not attempt to locate the pouch, Marquez heard Marshall and Clouatre arguing and came to see about the problem. I credit Austin’s recollection of the ensuing conversation that began with Marquez asking Marshall what was “going on with your attitude.” Marshall replied that he was trying to put up furniture. More words were exchanged. Marshall stated that it “looks like this Company is becoming one-sided.” Austin muttered, “Yes, Bobbie, you’re right,” and Clouatre said, “Reggie, you shut up.” Marquez asked Marshall what he meant, and Marshall referred to the incident the previous day, stating that when Marquez “thought it was one of us that threw the chair away, you were ready to make one of us pay for it, [but] [w]hen you found out it was Crystal [Clouatre], you immediately covered up for her ... [and] you weren’t man enough to apologize.”

Marshall confirmed that he made the “one-sided” comment and recalled that Marquez then stated, “[W]e’ve got to work together, but you need to start listening to them,” referring to Clouatre and Meliet. Marshall mentioned a prior conversation in which his seniority had been noted and argued that Marquez was “telling me that I’ve got to listen to them now.” More words were exchanged, and Marshall stated that he was just going to do what he had to do. Marquez asked, “What do you have to do?” Marshall answered, “That’s my business.”

Marquez does not dispute the substance of the foregoing conversation. He recalls telling Marquez, “We got to work this thing out,” and that Marshall replied that there was no working it out. He stated that the Company could not have two managers that were not going to talk to each other, and Marshall replied that he knew “how to handle this.” He asked what Marshall meant, and he replied, “Well, you’ll see.” He did not deny that Marshall accused the Company of becoming “one-sided.”

The events critical to this proceeding occurred the following day, July 28.

B. Supervisory Status

Before addressing the events of July 28, it is necessary to determine the supervisory status of Warehouse Manager Marshall. Marshall’s supervisory title and status as a salaried employee, even though he continued to punch a timeclock, “are merely secondary indicia of supervisory status.” *John N. Hansen, Co.*, 293 NLRB 63, 64 (1989). As found in that case, “such

evidence is insufficient to prove that he exercises independent judgment in performing any of the functions set forth in Section 2(11) of the Act.” Marshal’s oversight of warehouse operations involved assuring that furniture received at the warehouse was properly stored and that the furniture items from inventory were loaded onto the delivery trucks that carried them to customers or showrooms. The delivery slips were prepared by Service Manager Clouatre. Marshall physically moved furniture and, when necessary, would drive a delivery truck.

Section 2(11) of the Act provides that a supervisor is “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.” The burden of establishing that an individual is a supervisor is upon the party asserting the supervisory status of the individual in question.

There is no evidence that Marshall possessed or exercised any authority to transfer, suspend, lay off, recall, promote, reward or adjust the grievances of the warehouse employees. Marquez determined all issues relating to employee compensation. As already noted, he individually informed the employees in May that they would not be receiving a raise.

Despite Marshall’s absence of authority relating to compensation, Marquez testified that Marshall had the authority to hire. He produced no documentation in support of that testimony, and he named no employee purportedly hired by Marshall. I do not credit that testimony. Although Marshall provided some applicants with applications, the record establishes that all hiring decisions were made by Marquez. Driver Derrick Thornton, after receiving an application and speaking with Marshal, was interviewed by Marquez who told him to start working as a driver helper. When a driver was terminated for stealing fuel, Marquez informed Thornton that he would become a driver. Driver helper Will Norton was hired by Marquez. Reginald Austin sought work at one of the showrooms and was referred directly to Marquez, who interviewed and hired him. I do not credit the bare assertion of former employee Pierre Jones that Marshall hired him. His assertion was unaccompanied by any details, and he did not state who informed him of his pay rate. Bobbie Marshall, III, was interviewed and hired by Marquez at \$6 per hour. Thereafter, Marshall, III, learned that the employee identified as Scott was making \$8 an hour. When questioned as to whether he approached Marquez about the disparity, Marshall, III, explained that he did not because Marquez “told us to not let anybody know how much you were making, to keep it to yourself. So I didn’t want to go in and get him [Scott] in trouble.” Marquez did not deny the foregoing testimony which confirms that, in addition to the hiring decision, Marquez set individual pay rates that differed among the employees.

Although Marquez asserted that Marshall had the authority to discharge employees, his testimony in that regard was unconvincing, and he admitted that Marshall had never done so.

With regard to discipline, the Respondent introduced into evidence two documents reflecting discipline issued to two employees that contain Marshall’s name. A typed memorandum to employee Charles Felton, dated March 21, 2003, although stating that it is from Marshall, is written in the third person, stating that, on March 20, 2003, Felton was absent and did not call or leave a message for “Bobbie or Larry that you were not going to be here.” The typed memorandum to employee Pierre Jones regarding tardiness on September 20, 2003, purporting to be from “Bobbie Marshall, Warehouse Manager and Larry Marquez, Owner,” bears a handwritten correction in which the last name of “Bobbie” has been stricken and the name “Marshall” has been written in.

Marshall denied seeing either of the foregoing documents until they were presented by the Company in the investigation of this case, and he denied that he issued the foregoing discipline. Marshall's signature does not appear upon either document whereas other documents in the record reflecting discipline bear the signature of the individual who issued it. I credit Marshall's denial, but I do not question the authenticity of the documents. Thus, it appears that the Company, in 2003, purported to issue discipline in Marshall's name although Marshall was unaware of that fact and did not issue the discipline.

Marquez did not address the absence of Marshall's signature upon the two foregoing documents. With regard to discipline, he reported that Marshall informed him that he had spoken to employee Austin about spending too much time on the telephone. Documentary discipline to Austin for spending too much time on a telephone is dated June 21 and was issued by Service Manager Clouatre. No discipline since 2003 has been issued in Marshall's name.

Pierre Jones did not testify regarding the discipline reflected upon the document dated September 20, 2003, that was purportedly issued by Marshall. Jones claimed that Marshall sent him home and recounted an incident in 2004 upon which Marshall had directed him to sweep up in the warehouse prior to leaving on his route. Jones protested that doing so would cause him to run late. An argument ensued. Although Jones initially testified that Marshall sent him home, on cross examination he admitted, "I chose to go home." There is no evidence that Jones was disciplined for his failure to sweep or his leaving.

Employee Will Norton testified to an occasion upon which Marshall purportedly sent him home early; however, his testimony establishes that, on the occasion in question, Marshall simply assigned Norton to work in the warehouse and that he went home when his work was completed. The record does not establish whether the driver who Norton regularly assisted had any deliveries to make that day or whether the deliveries required an assistant. The only discipline reflected in the record relating to Norton is a warning on June 28 for being tardy. That discipline was issued by Service Manager Crystal Clouatre, not by Marshall.

There is no evidence that Marshall ever issued any discipline and there is no evidence that discipline was issued in his name after 2003. Clouatre, who issued discipline to warehouse employees Austin and Norton in 2005, did not testify.

There is no credible evidence that Marshall possessed or exercised the authority to hire, fire, or discipline employees.

Regarding the assignment and direction of employees, Marquez described Marshall's duties as supervising "the warehouse in getting merchandise in, getting it racked, getting it pulled for the delivery trucks, getting the delivery trucks routed." There is no probative evidence that Marshall exercised independent judgment in carrying out those duties. The routes of the delivery trucks were prescribed by geographic area. As Marshall explained, "all the drivers know that you start from wherever is closest to the warehouse ... and just keep on going." Pierre Jones testified that Marshall would inform the drivers whether they would be "off the next day or that you're working the next day, depending upon the amount of deliveries." He confirmed that the routing was routine, that "we" would "refrain from sending two trucks in the same area" unless "we had no choice but to run two trucks" because of the volume of deliveries. "Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Home Health Agency*, 337 NLRB 826, 830

(2002), citing *Express Messenger Systems*, 301 NLRB 651, 654 (1991) and *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985).

When Marquez was questioned regarding Marshall's responsibility for routing, the only example he cited was his assisting an inexperienced driver "by spreading out the sheets, getting the zip codes," and explaining that "this Metairie goes along with this Metairie, and this Kenner goes behind this Metairie." Marshall would "put them in order because he had been doing it for so long" based upon his "[g]eographic knowledge and time frames," how long it would take to get from point A to point B based upon "17 years of experience." The direction thus provided falls short of the independent judgment contemplated by the Act. See *Express Messenger Systems*, supra. The Supreme Court, in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2000), recognized that "[m]any nominally supervisory functions may be performed without the "exercis[e] of such a degree of.. judgment or discretion.. as would warrant a finding" of supervisory status under the Act. *Weyerhaeuser Timber Co.*, 85 N.L.R.B. 1170, 1173 (1949)" and, citing *Providence Hospital*, 320 N.L.R.B. 717, 729 (1996), that "supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position." Id at 713, 714-715, fn. 1. As pointed out in *Unifirst Corp.*, 335 NLRB 706, 713 (2001), "If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car. *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967)."

I reject any argument that Marshall possessed genuine supervisory authority. The fact that Marquez stated his intention to hold this purported supervisor monetarily liable for the throwing out a chair until he learned that the action had been directed by Service Manager Clouatre further confirms that Marshall was not vested with supervisory authority and did not exercise independent judgment on behalf of the Company.

Marquez testified that Marshall had the authority to set the starting time of warehouse employees. That assertion is belied by his discharging Marshall as well as the other warehouse employees who did not report on the morning of July 28 without ever speaking with Marshall to determine whether he had changed the starting time. Marshall had no more authority to set reporting times without the approval of Marquez than he did to throw out a chair without being held financially responsible. I find and conclude the Respondent failed to prove that Marshall was a supervisor as defined in the Act.

C. Facts

On the evening of July 27, following the encounter in which Marshall informed Marquez that he was going "to do what I've got to do," Marshall contacted the warehouse employees and requested that they meet with him behind the warehouse the following morning. All of the employees did so. Although there is conflicting testimony regarding Thursday reporting times, documentary evidence establishes that all warehouse employees except for Freddie Hughes had been reporting about 7:30 a.m. on Thursdays for several weeks preceding July 28.

All of the warehouse employees met behind the warehouse on the morning of July 28. Although the employees do not totally agree regarding when each arrived or whether a particular employee arrived before or after another employee, there are no significant inconsistencies. More significantly, there is no question that Marquez was informed that "all of the employees" were present "behind the warehouse" and "were going on strike." Marquez testified that he terminated all of the employees because they did not call in and failed to report

to work, the reasons stated on the termination slips. I do not credit that testimony.

Although Marshall recalls asking the employees to meet at 7:30 a.m., employee Will Norton, who contends that he reported to work on time, testified that Marshall requested he come at 7:00 a.m. Norton recalled that, when he arrived, only Marshall, Freddie Hughes, and Reggie Austin were present. He asked Marshall what was going on, and Marshall replied, "We're going on strike." Norton stated that the employees were crazy, and Marshall stated that they were "fed up with all this." Hughes concurred. Norton made no further inquiry, repeated that the employees were crazy, stated that he had bills to pay, and left. As he was leaving, Norton says that he asked Marshall whether he should tell Marquez where the employees were and that Marshall replied, "No, don't let him know anything."

Marshall recalls telling Norton, "[T]hat's really up to you. It's not a problem." Employee Derrick Thornton testified that he was present when Norton was present and that Norton left to report to work at 7:50 or 8 a.m. The discrepancy regarding time is immaterial.

Norton denies having any conversation with Marquez regarding the employees until after Service Manager Clouatre, who had left the warehouse on an errand, spoke with Marquez.

After Norton left, Clouatre drove up and parked where she could observe the employees. She called driver Derrick Thornton, who carried a two-way radio, and asked what he was doing. Thornton replied that "[W]e were sitting back here waiting to talk to Larry."

Marquez admits that, between 8:30 and 8:45 a.m., he received a call from Clouatre in which she informed him that "the warehouse employees ... [were] behind the warehouse sitting in the back of Bobbie's [Marshall's] truck." Upon receiving that call, Marquez told Norton what Clouatre had said, and Norton reported that Marshall had called him the previous evening about attending a meeting, that he had been at the meeting and "they were all going on strike." Norton stated that he wasn't going on strike, that "they were going on strike, but he wasn't doing it."

Norton confirms that he informed Marquez that the "guys had called me into a meeting" and told him that they were "going on strike and tried to get me to go on with them." Marquez asked if Norton knew why and, without waiting for a response, answered his own question, stating that "it was probably about the fight that Bobbie and Crystal had gotten into."

Marquez testified that, notwithstanding his receipt of the foregoing information at between 8:30 and 8:45 a.m., he continued loading trucks for up to an hour. He was vague about the time, estimating, "Could have been 30, 40, 50, 60 minutes." He made no attempt to contact purported supervisor Marshall, who had a telephone so that he could be contacted at any time. About 9:45, "[s]omewhere around that time," Marquez went to his office and wrote out termination slips for all of the warehouse employees except Norton.

Service Manager Crystal Clouatre did not testify.

Each termination slip, including the termination slip of purported supervisor Marshall, states: "Did not call or show up for work on 7-28-05." The Company Employee Handbook requires employees to notify their supervisor by telephone at least one hour before reporting time and that if an employee does not "report as required for three (3) consecutive days" the employee will be deemed to have resigned and "your employment will be terminated." The Handbook also provides for immediate discharge for "[f]ailure to return to work for over three (3) working days without notifying the Company (considered as a resignation)." Employees are subject to a progressive disciplinary system that provides for a verbal counseling, written

warning, and suspension or termination. Employees had, prior to July 28, received discipline for tardiness and unexcused absences without calling in. Prior to July 28, no employee had ever been terminated for a single instance of failure to call in or a single unexcused absence.

5 Service technician Freddie Hughes, who had been employed for 17 years, credibly testified that he reported to work depending upon the number of service calls that he had to make. Thus, he had no set reporting time. He testified that on July 28, he was to report at noon to perform afternoon service calls. Documentary evidence establishes that, on the four
10 Thursdays in May, Hughes had reported to work after 10 a.m. twice, that on the five Thursdays in June he had been on vacation on one of the Thursdays and reported after 10 a.m. on two of the remaining four Thursdays. Marquez, who prepared the termination slips about 9:45 a.m., admitted that he did not check with anyone to determine when Hughes was “supposed to be in” on July 28 prior to discharging him because he “[d]id not call or show up.”

15 After Clouatre spoke to Thornton, she returned to the warehouse. The employees continued to discuss their concerns and Marshall sought to get them organized so that when they talked to Marquez, “we’d know what to say, not to get hostile or anything like that.” He sought to assure that the employees would present themselves correctly in order to “go in there and talk ... , because basically some of them were really kind of teed off about it.”

20 Employee Lionel Richardson, who was rehired, left the meeting at some point after 10 a.m., and went to the warehouse office. He spoke with Marquez who informed him that he was giving him a pink slip and that the remaining warehouse employees had also been terminated. Richardson returned to the group and informed them that they had been terminated. Marshall
25 and the remaining employees came to the warehouse office and retrieved their termination notices. Employees Derrick Thornton and Bobbie Marshall, III, sought to speak with Marquez, but were denied entry to his upstairs office by his secretary. Whether Marquez was present and refused to meet or had left to make deliveries is not established. It is undisputed that Marquez terminated the warehouse employees without first speaking with any of them.

30 Employee Reginald Austin came to the warehouse to obtain his final check and spoke with Marquez regarding the correctness of the hours shown. Austin was, of course, not paid for any time on July 28. As he and Marquez reviewed his time, Marquez referred to July 28 as the “day you all pulled that stunt.” Austin replied, “Mr. Larry, you know that wasn’t a stunt. You knew
35 we were back there waiting to talk to you.” Marquez replied, [W]ell, that’s all irrelevant right now.” Marquez did not deny the foregoing conversation.

D. Contentions of the Parties

40 The General Counsel argues that the Respondent was aware of the employees’ activity based upon the reports of Clouatre and Norton, that the testimony of the employees establishes that their discussion, which included perceived favoritism, racism, and wages, related to working conditions and was protected and concerted, and that the absence of a formal demand did not cause them to lose the protection of the Act.

45 The Respondent, in its brief, argues that the predicate for the failure of the employees to report to work on July 28 was Marquez’s denial of a request by Marshall for a loan. The Respondent’s answer pleads that Marshall “[i]n calling the meeting ... was improperly attempting to retaliate against Marquez” for refusing Marshall’s request for a loan. Marshall admits requesting and being denied a loan in late June. I do not credit the testimony of Marquez that the request was on Monday, July 25. Regardless of the date, there is no evidence whatsoever that the meeting of the employees related in any way to denial of a loan.

The Respondent argues that the activity in which the employees engaged was not protected in that the “overwhelming complaint voiced by the charging parties was their dislike of Crystal Clouatre,” and there were no immediate safety, environmental, or other such issues.

Contrary to the foregoing argument, the issue was not dislike of Clouatre, it was inequitable treatment of the African-American warehouse employees. As explained by Thornton, when Marquez “thought the warehouse employees were doing something wrong he was ready to punish us ..., [but] [a]s soon as he found out it was Crystal [Clouatre], everything was fine and dandy.” Similarly, when Austin complained that Clouatre was exhibiting favoritism towards Norton, Marquez asked if he was not “seeing things,” and Austin replied, “[I]t wasn’t what I saw, [i]t was what I heard.” On July 27, Marshall accused the Company of becoming “one-sided,” citing the threat of Marquez to have the responsible warehouse employee pay for the chair, but not mentioning payment when he learned that Clouatre had been responsible.

The Respondent’s brief does not cite or discuss case authority that establishes that activity related to perceived favoritism or racial discrimination is directly related to working conditions and is protected activity. See *Titanium Metals Corp.*, 340 NLRB 766, 773 (2003) and *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 710 (1999).

The Respondent asserts that there is not “a scintilla of the necessary evidence that the employer was aware of any protected activity.” I disagree. Although the Respondent’s brief acknowledges that Marquez was informed that the warehouse employees were “behind the building,” it does not recite Norton’s report that “they were all going on strike.” At no point does the brief acknowledge that Marquez admitted being told that the employee were on strike.

E. Analysis and Concluding Findings

The complaint alleges that, on July 28, the employees met for their mutual aid and protection to discuss the absence of a wage increase, perceived favoritism and racial prejudices, treatment by supervision and other working conditions; that they ceased work concertedly and engaged in a strike; that the Respondent believed that they had ceased work concertedly and engaged in a strike; and that it terminated them for that reason.

Employee activity is concerted when it is “engaged in with or on the authority of other employees,” and a respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee’s concerted activity, it takes adverse employment action that is “motivated by the employee’s protected concerted activity.” *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). All of the warehouse employees met Marshall behind the warehouse on the morning of July 28. Norton left. The remaining employees discussed their various complaints regarding perceived favoritism and discrimination and other working conditions and were counseled by Marshall to present those complaints in a manner that was not hostile.

Marquez admits that Norton informed him that the employees “were going on strike, but he wasn’t doing it.” When Marquez asked Norton whether he knew why, he answered his own question stating that “it was probably about the fight that Bobbie and Crystal had gotten into.” That argument concluded with the confrontational exchange in which Marshall accused the Company of becoming “one-sided,” an assessment with which Austin agreed only to be told by Clouatre to “shut up.” Marshall then cited the chair incident, telling Marquez that, when he thought a warehouse employee was responsible for throwing away the chair, “you were ready to make one of us pay for it, [but] [w]hen you found out it was Crystal [Clouatre], you immediately covered up for her ... [and] you weren’t man enough to apologize.” The foregoing clearly

expressed perceived inequity in the treatment by management of the African-American warehouse employees.

A respondent's belief that protected activity has occurred is controlling. *Henning and Cheadle*, 212 NLRB 776, 777 (1974). Marquez believed that the employees were on strike, as reported by Norton. He informed Norton that he believed that the strike related to the argument between Marshall and Clouatre the previous day that concluded with Marshall's statements expressing disgruntlement relating to the treatment of warehouse employees. Although Marquez did not admit that Clouatre informed him that employee Thornton had stated that the employees were waiting to speak to him, he did not deny, as stated to him by employee Austin, that he "knew we were back there waiting to talk to you." As Counsel for the General Counsel correctly points out, "Respondent cannot blind itself to the surrounding action and claim that it did not know the walkout was based upon a protected activity." *Virginia Mfg. Co.*, 310 NLRB 1261 (1993), citing *Eaton Warehousing Co.*, 297 NLRB 958, 961-962 (1990), enf. mem. 919 F.2d 141 (6th Cir. 1990).

The concerns of the employees differed. Austin and Marshall, III, were concerned about pay. Austin was also concerned with what he regarded as favoritism toward Norton, a concern he had expressed to Marquez. Hughes was upset with the removal of his responsibility for ordering the parts necessary for him to perform his job. Thornton was concerned that Clouatre would take a white person's word over an African-American's word. Marshall was seeking to assure a presentation of the various grievances that would not be hostile, which included his concern that the Company was becoming "one-sided." "The Act is concerned with concerted activity, not concerted thought. Any contention that a failure of all participants in a group activity to entertain identical reasons for engaging in that activity renders the activity individual rather than concerted is plainly without merit." *Advance Cleaning Service*, 274 NLRB 942, 945, (1985).

The Respondent argues that Marquez expressed no animus and discharged the employees because of their failure to report to work and not calling in. As explained in *Burnup & Sims, Inc.*, 256 NLRB 965 (1981), "the existence of or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." *Id.* at 975. "Calling a strike ... an absence from work justifying discharge is to write Section 13 out of the Act." *Anderson Cabinets*, 241 NLRB 513, 518, 519 (1979).

Section 13 of the Act provides that "[n]othing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike"

The fact that the employees gave no advance notice of their intention is immaterial. The failure of the employees to report to work was "a concerted action for mutual aid and protection." *Lisanti Foods Inc.*, 227 NLRB 898, 902 (1977). See also *Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003).

The Respondent argues that it had no knowledge of the reason that the employees did not report to work. Marquez knew the employees were behind the warehouse, and he had been told that they were going on strike. "[T]he employees' failure to make any specific demand or to notify the Respondent of their reasons for their cessation of work does not render their conduct unprotected." *Eaton Warehousing Co.*, supra at fn. 1. In this case, Marquez "knew we [the employees] were back there waiting to talk to you." He correctly believed that the employees' action related to the argument the previous day. Marquez had intervened in that argument and been told by Marshall that he was concerned that the Company was "one-sided." The fact that the employees never made a demand in support of their concerted action is immaterial. As stated in *South Central Timber Development, Inc.*, 230 NLRB 468, 472 (1977):

It is well settled that a walkoff to protest working conditions is a protected concerted activity. *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962). It is protected even if the employer was unaware of its purpose, for as the Court said at 14: "... We cannot agree that employees necessarily lose their right to engage in concerted activities under §7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." Thus, it is clear that, even if the purpose of the walkoff is not clearly communicated to the employer at the time, if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1).

In this case, the Respondent gave no opportunity to the employees to present a demand. Employee Richardson went to the office and discovered that he and the others had already been discharged. When Marshall and the other employees arrived, Marquez either had already left or informed his secretary not to let in the employees.

Marquez terminated Marshall and Hughes, as well as the other three warehouse employees and Richardson, purportedly because they "[d]id not call in or show up." Marquez, although claiming that Marshall had the authority to set the starting time for employees, did not seek to confirm with him whether he had given the employees permission to report later than 7:30 a.m. Hughes had no regular starting time and was to have reported at noon. He committed no offense. Marquez discharged him without checking with anyone to determine when Hughes was "supposed to be in." The Respondent's brief does not address the discharge of Hughes.

The General Counsel established that the protected concerted activity in which the warehouse employees were engaged was the motivating reason for their discharges. Any claim to the contrary is refuted by the discharge of Hughes who committed no offense but participated in the concerted activity and was discharged in the same manner as the other participants.

The General Counsel presented a prima facie case. Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the burden of going forward shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the employees' protected conduct. The Respondent has not sustained that burden. The Respondent disregarded its Employee Handbook, which provides for progressive discipline and termination upon three consecutive unexcused absences. Prior to July 28, discipline had been meted out in accord with the Handbook. Prior to July 28, no employee had ever been terminated for a single failure to call in or a single unexcused absence. The Respondent has not established that it would have taken the same action against these employees in the absence of their protected concerted activity.

I find that the Respondent discharged these employees because it believed that they were engaged in a strike, which is protected concerted activity. I find it particularly disheartening that Marquez, having worked with Marshall and Hughes for over 17 years, terminated purported supervisor Marshall and service technician Hughes, who was not late for work, without speaking with either of them. Marquez's termination of Marshall, who had a telephone upon which he could be contacted 24 hours a day, confirms that he was not vested with any genuine supervisory authority and that Marquez did not consider him to be a supervisor. The inclusion of these two employees in the Respondent's unprecedented terminations upon a first offense of failure to call in or report to work constitutes irrefutable evidence that the employees were

terminated for “going on strike.” The Respondent retaliated against these employees because they engaged in protected concerted activity, and the Respondent has presented no credible evidence that it would have taken the same action in the absence of the protected concerted activity in which the employees engaged. I find the discharges of the employees violated
 5 Section 8(a)(1) of the Act as alleged in the complaint.

Conclusions of Law

By discharging Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin,
 10 and Bobbie Marshall, III, because they engaged in protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

15 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

20 The Respondent having discriminatorily discharged Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, it must offer them reinstatement and must make them whole for any loss of earnings and other benefits, and to make each employee whole for any loss of earnings and other benefits. *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), enf. denied on other grounds, 612 F.2d 6 (1st Cir.) Backpay shall be
 25 computed on a quarterly basis from July 28, 2005, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will also be ordered to post an appropriate notice.

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

35 The Respondent, CGLM, Inc., Jefferson, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

40 (a) Discharging employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Jefferson, Louisiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 28, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 28, 2006.

George Carson II
Administrative Law Judge

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge any of you for engaging in protected concerted activities.

WE WILL, within 14 days of the Board's Order, offer Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Bobbie Marshall, Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall, III, in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CGLM, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1515 Poydras Street, Room 610, New Orleans, LA 70112-3723
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389